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In the
Supreme Court of the United States

NOVEMBER 28, 1984

MIKE MEHDI FOOLADI,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit Court of Appeals improperly considered counsel's argument to determine the sufficiency of the Trial Court's instructions to the jury.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No.

DR. MIKE FOLADI,

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versus

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Petitoner, DR. MIKE FOOLADI, respectfully prays for a Writ of Certiorari to be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on November 2, 1984

CITATIONS TO OPINIONS BELOW

The United States District Court for the Western District of Texas, El Paso Division, entered a judgment of conviction for one count of attempting to manufacture amphetamines, and one count of manufacturing phenyl-2-propanone, contrary to 21 U.S.C. Sec. 841 (a) (1).

The Conviction was made the subject of an appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the judgment on the 2nd day of November 1984 in an opinion entitled The *United States of America v. Dr. Mike Fooladi*, No. 84-1117. The opinion is reproduced herein as Appendix A. The Petitioner subsequently filed a petition for re-hearing by the panel, which was denied on the 28 of November, 1984. A copy of the order denying a re-hearing is printed in Appendix B.

JURISDICTION

The judgment of the United States District Court was affirmed by the United States Court of Appeals and the Petitioner's Petition for re-hearing was denied on the 28 of November, 1984. Jurisdiction of this Honorable Court is invoked under 28 U.S.C. Sec. 1254 (1) and Supreme Court Rule 22.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment V reads in part:

No person ... shall be deprived of life, liberty or property, without process of law;

The United States Constitution Article III, Sec. 1 provides in part;

The Judicial Power of the United States shall be vested in one Supreme Court, and in such interior courts as Congress may from time to time establish.

STATEMENT OF THE CASE

A. Course and proceedings in the courts below.

The Petitioner was indicted on a two Count indictment alleging the manufacture of a controlled substance P-2-P, and the intent to manufacture amphetamines. The Trial Court originally suppressed the search warrant, but that decision was overturned by the United States Court of Appeals for the Fifth Circuit in *United States v. Fooladi*, F 2d. 180 (5 Cir. 1983). This writ does not involve the holdings in that appeal.

The case was tried to a jury in the Western District of Texas, and the Petitioner was convicted of the two counts and sentenced to 5 years probated.

On appeal the United States Court of Appeals for the Fifth Circuit found that the Trial Court had erred in not explaining to the jury the law concerning the defense urged by the Petitioner. The Court held that on the facts of this case the jury should have been more fully instructed concerning his defense that he did not know that his acts were unlawful. The Court held that the Trial Court should have instructed the jury that the government must prove beyond reasonable doubt that the Petitioner knew what he was doing was unlawful (Opinion. p.8). The Court concluded, however, that the conviction was saved by the argument of his attorney which fully developed his defense. The opinion is Appendix A.

The motion to re-hear noting this Courts holdings that jury instructions cannot come from the defense attorney was overruled. The order is Appendix B.

B. Statement of the Facts

The Petitioner admitted that he had made P-2-P, and

was trying to make amphetamines. His defense was he thought his actions were legitimately lawful research as he maintained he was acting in the normal course of his professional activities. The Petitioner has a Ph.D. in chemistry and has been so employed.

REASON WHY THE WRIT SHOULD BE GRANTED

1. The United States Court of Appeals improperly considered counsel's arguments to determine the sufficiency of the Trial Court's instructions to the jury.

Dr. Fooladi presented the defense to the jury that he did not believe that he was committing any offense by his research. The Defense presented evidence of the defendant's education and background to demonstrate that he was legitimately pursuing a scientific investigation into the substance in question. The Attorney for the Defense timely requested a charge on this defense, a charge that the government must prove beyond a reasonable doubt that the Defendant did not act to violate the law. The Court of Appeals properly held that the charge should have been given:

> ...(T)he addition of a simple sentence that the government was required to prove beyond a reasonable doubt that Fooladi knew that what he was doing was unlawful, would have defused this serious appellate attack on the conviction. (Opinion, p.8)

The Court then held that the excellent jury argument of the Defense Attorney curred the error:

> Fooladi's conviction was saved by the circumstance that his case was fully developed and argued to the jury — ironically, because he was well defended. (Opinion p.7)

The Court of Appeals recognized that this decision was contrary to other cases such as *United States v. Goss*, 650 F. 2d. 1336 (5 Cir. 19810, but tries to carve a new and

distinguished analysis, that of an enlargement of the role and importance of jury argument. The Court of Appeals began its analysis by stating "A central purpose of the charge is to provide the framework for the argument by counsel." (Opinion p. 4). There is no citation to any authority for this Proposition. The reason that there is no citation is that heretofore the central purpose of the charge was to instruct the jury as to the law, and to define the factual issues the jury must decide. *United States v. Gilbreath* 452 F. 2d 992 (5th Cir. 1971). Counsel's argument has already been delivered to the jury. Fed Rules Crm Proceddure R 51. Frameworks do not come after the walls are built.

However, the real vice to this analysis is the proposition that the advocate for the defendant can instruct the jury as to the law. This proposition has been examined before by the United States Supreme Court and found wanting. In *Taylor v. Kentucky* 436 U.S. 478 (1979). This Honorable Court held that jury argument by the attorney is no substitute for instructions by the Trial Court. The reason is that the jury is specifically instructed that the statements of the attorneys are neither evidence nor the law, but merely a point of view in favor of one side or the other. The Trial Court in this case told the Jury:

> remember that any statement, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, ... In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the

case. *What the lawyers say is not binding upon you* (emphasis added). Courts Charge p 4A

It has never before been held that the Jury argument can cure an error in the Courts instructions. A jury should only look to the Trial Court for guidance as to the applicable law. To have a system that permits the Attorneys to amplify or change the law from that stated by the Trial Court is to invite anarchy and to diminish the role and importance of the Trial Court. This holding also encourages poor lawyering, rather than encouraging excellence. If an attorney believes that the court will err in its' instructions, the teaching of this case is not to try too hard to minimize the damage by good argument.

The Defendant in this case did not get a fair trial in that the law that supported his defense was not presented to the jury by the Trial Court, and the error cannot be repaired by the argument of his attorney, however brilliant.

CONCLUSION AND PRAYER

Wherefore Premises Considered, the Petitioner prays that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to examine the above matter.

Respectfully submitted

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By

Scott E. Segall

CERTIFICATE OF SERVICE

The undersigned Attorneys for the Petitioner, Dr. Mike Fooladi, hereby certify as follows:

(a) I am a member of the Bar of the United States Supreme Court and that I have duly served all parties required by the Rules of the said Court to be served by the foregoing Petition for the Writ of Certiorari as hereinafter shown:

(b) That the names and addresses of the Attorneys of record are as follows:

(1) The honorable Solicitor General
of the United States Department of Justice
Washington D.C. 20530

(2) Helen Milburn Eversberg
655 E. Duranago Blvd. Suite G-13
San Antonio, Texas

(c) That on this day I served three printed copies of the foregoing Petition for a Writ of Certiorari on the said attorneys for the Respondent by depositing same in the United States Post Office, with first class postage prepaid, properly address to the said Atorneys for Respondent at their said addresses.

EXECUTED, this day of January, 1985

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